

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

EDMOND J. BROWN

v.

CA No. 00-290-T

ASHBEL T. WALL

**MEMORANDUM AND ORDER**

Edmund Brown objects to the Report and Recommendation of a Magistrate Judge that Brown's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied as time barred.

As stated in the Magistrate Judge's Report, The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2261, et al., became effective on April 24, 1996, and requires habeas petitions to be filed within one year after a conviction becomes final. However, in cases like Brown's, where the conviction became final before the enactment of the AEDPA, a defendant has a grace period of one year from the statute's effective date in which to file a petition. Gaskin v. Duval, 183 F.3d 8,9 (1<sup>st</sup> Cir. 1999). The time during which a state court application for post-conviction relief is pending is not counted in calculating the one year period. § 2244(d)(2).

Since Brown's conviction became final on January 26, 1993, he had until April 23, 1997, to file his § 2254 petition. Brown filed a petition for State collateral relief on June 23, 1997, two months after the deadline. That petition was rejected on August 5, 1999,

and it was not until June 12, 2000, that Brown filed the instant § 2254 petition.

Brown argues that his tardiness should be excused because he relied on counsel to file the petition on time. Brown alleges that his first attorney, Ina P. Schiff, negligently failed to file a petition for post-conviction relief in state court and that, in December, 1996, he retained attorney Donna A. Uhlmann to do so. As already noted, that petition was not filed until June 23, 1997, 60 days after the deadline for filing a federal habeas petition.

Brown's argument, presumably, rests on the premise that his counsel were ineffective in failing to file his petition for post-conviction relief soon enough to toll AEDPA's statute of limitations. However, in Coleman v. Thompson, 501 U.S. 722, 757 (1991), the Supreme Court held that a defendant's tardiness in appealing the denial of his state court petition for post-conviction relief barred him from raising his claims in a federal habeas petition even though the delinquency allegedly resulted from counsel's inattentiveness. The Coleman court ruled that the defendant's procedural default in failing to exhaust available state remedies was not excused by counsel's alleged ineffectiveness because there is no constitutional right to an attorney in post-conviction proceedings. Id. at 752.<sup>1</sup>

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<sup>1</sup>After Coleman was decided, Congress amended 28 U.S.C. § 2254 to provide that the "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction

Coleman is dispositive of Brown's petition. As is the case in state post-conviction relief proceedings, a petitioner in federal habeas corpus proceedings has no constitutional right to counsel; and, therefore, cannot point to counsel's alleged ineffectiveness as justification for the failure to timely file his § 2254 petition. Had Brown not retained counsel and simply failed to file his petition on time, his petition would be time-barred. The fact that he chose to retain counsel and that counsel failed to file his petition sooner does not entitle Brown to relief that he would not have been entitled to had he represented himself *pro se*.

#### Conclusion

Accordingly, the Recommendation of the Magistrate Judge is hereby accepted, and Brown's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied and dismissed because his petition was untimely filed.

By Order

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proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Clearly, the statute bars relief when counsel's allegedly deficient performance is the ground upon which relief is sought. It is debatable whether the statute, expressly, bars relief sought on other grounds when counsel's negligence is cited only as an excuse for late filing. However, there is no question that Coleman bars relief in such cases and that the amendment does not negate the holding of Coleman. Neal v. Gramley, 99 F.3d 841, 843 (7<sup>th</sup> Cir. 1996).

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Deputy Clerk

ENTER:

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Ernest C. Torres  
Chief Judge

Date: , 2000

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